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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVIS ANDRE DAVIS,

Defendant and Appellant.

C056957

(Super. Ct. Nos.
06-2010 & 07-185)

In case No. 06-2010, a jury convicted defendant Davis Andre Davis of possessing and transporting methamphetamine. (Health & Saf. Code, §§ 11379, subd. (a), 11377, subd. (a).) In case No. 07-185, a jury convicted defendant of attempting to influence a juror in case No. 06-2010. (Pen. Code, § 95, subd. (a).) The trial court in case No. 07-185 also determined as an enhancement that defendant was released from custody at the time he attempted to influence a juror. (Pen. Code, § 12022.1, subd. (b).)

The court sentenced defendant in both cases at the same hearing. In each case, the court placed defendant on formal probation for three years and ordered him to serve a jail term of 90 days consecutive to one another. The court also ordered him to pay various fines, penalties, and fees.

Defendant appeals from both judgments, raising the following contentions:

1. The trial court in case No. 07-185 erred when it denied defense counsel's request for additional closing argument after the court provided an additional instruction to the jury following closing argument;

2. Insufficient evidence supports the conviction in case No. 07-185 of attempting to influence a juror; and

3. The trial court failed to identify the statutory authority for some of the penalties and fees it imposed in both cases.

Except to remand both cases to the trial court for identification of the statutory authority for all of the fines, penalties, and fees it imposed, we affirm the judgment.

FACTS

Because defendant does not contest the judgment in case No. 06-2010 except for the recitation of statutory authority for assessed penalties, we recite only the facts of case No. 07-185.

During a lunch break in the case No. 06-2010 trial, Juror L. used the bathroom. He was wearing a juror badge on his shirt. While Juror L. was using the urinal, defendant came out of a stall. As he passed by Juror L., defendant said, "Vote for me." Then he smiled, laughed, and walked away. No one else was in the bathroom.

Juror L. testified that defendant made the statement "almost like a joke." Juror L. thought defendant was trying to be funny, and the statement was not made in a threatening way.

However, Juror L. believed defendant was not supposed to speak to a juror. Not knowing what to do, and not wanting to get in any trouble, Juror L. wrote a note to the judge explaining the incident. The court excused Juror L. from jury service.

DISCUSSION

I

Denial of Additional Closing Argument

After the attorneys completed their closing arguments, the trial court developed an instruction to explain the term "corruptly" as that term is used in defining a violation of Penal Code section 95. Defendant claims the trial court denied him his constitutional right to counsel and to present a closing argument when it refused to reopen closing argument to allow the attorneys to address the new instruction. We disagree.¹

A. Additional background information

One of the instructions to be submitted to the jury concerned the elements of proving a violation of Penal Code

¹ Penal Code section 95 reads in relevant part: "Every person who corruptly attempts to influence a juror . . . in respect to his or her verdict in . . . any cause or proceeding, . . . is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the state prison, if it is by means of any of the following: [¶] (a) Any oral or written communication with him or her except in the regular course of proceedings. . . ."

section 95. The fourth element of that offense, as provided in the instruction approved by the court, required the prosecution to prove that defendant, in attempting to influence Juror L., made his statement "with the specific intent of attempting to corruptly influence the juror's verdict or decision."

Both attorneys discussed this element of the offense during their closing argument. The prosecutor argued the phrase "corruptly influence" referred to an attempt to persuade or influence a juror outside the normal processes and confines of a trial.

Defense counsel argued there was no evidence defendant had a corrupt intent and that defendant's statement was just a bad joke. Counsel told the jury it had to review what defendant said as well as discern defendant's mental state and intent at the time he made his statement. The law required defendant to have had a specific intent at the time he made his statement, an intent the law called "corruptly."

Counsel explained the court would instruct the jury to give words their ordinary meaning unless the word had a different meaning in the law, and in that case the court would provide the legal definition of the word. Counsel told the jury to apply the ordinary meaning of the word "corruptly" in its analysis.

Counsel developed hypothetical examples to help explain the meaning of "corruptly." In one example, counsel drew a distinction between a border inspector who fails to inspect containers because he is lazy, and one who does not inspect

certain containers because he has been bribed. The fact that one guard was lazy did not mean he was also corrupt.

Counsel used other examples to draw a distinction between acts that were corrupt and those that were not. Noncorrupt acts included normal social contact, such as when an attorney and a juror are in the same room together outside the courtroom, or if a person who happens to be on trial says "thank you" to a juror who holds a door open for him, or if an attorney says "good morning" to a juror while passing in the hallway. Defense counsel argued that defendant's statement to Juror L. was similar to these types of social contacts. Defendant's intent was to make a joke, not influence Juror L.'s decision.

Counsel asserted the jury was being asked to convict defendant based on the literal meaning of his statement when the law required the conviction to be based on a specific intent. "[A]nd the specific intent," counsel argued, "is that it has to be done corruptly. So, if it's done as a joke, that's not corruptly."

Following the completion of closing argument, the trial court informed the attorneys outside the presence of the jury that it had found a definition of the term "corruptly" in Penal Code section 7. The court read: "'The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to or some other person.'" Stripping away the verbiage from the statute not applicable to this case, the court proposed to

define "corruptly" to the jury as "a wrongful design to acquire or cause some advantage to the person guilty of the act."

Defense counsel moved for each side to have additional argument to the jury because the court's proposed instruction changed the earlier agreed upon instruction. Counsel had told the jury "corruptly" would have an ordinary meaning, and now the court was giving the term a specific meaning. He did not want the jurors to think he had misled them in any fashion. He thought even 60 seconds for each side would be appropriate.

The prosecutor objected. He claimed the proposed instruction did not expand on the ordinary meaning of "corruptly." It still referred to someone who had wrongfully designed to gain an advantage, and that was what both sides had already argued.

The trial court agreed with the prosecutor: "Yeah. That's what we've done. It's either a bad joke or it's an advantage, so I don't kind of think we need any more argument."

B. *Analysis*

Defendant claims the trial court's refusal to reopen argument in essence deprived him of the opportunity to present a closing argument on the heart of his case -- whether defendant had acted with the specific intent to corruptly influence a juror. But as the factual discussion just recited shows, the issue of defendant's intent was the very issue defense counsel had already argued.

Defendant has a constitutional and statutory right to present a closing argument. (*Herring v. New York* (1975) 422

U.S. 853, 865 [45 L.Ed.2d 593, 602] (*Herring*); Pen. Code, § 1093, subd. (e).) As a matter of constitutional law, however, the trial court has "great latitude" in limiting the scope of closing argument. (*Herring, supra*, 422 U.S. at p. 862.) The trial judge may "terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion." (*Ibid.*)

As a matter of statutory law, the trial court is to decide which instructions to give before the commencement of argument. (Pen. Code, § 1093.5.) This rule is to give the parties the opportunity to intelligently argue the case to the jury. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 341.) "Material modification and departure from agreed upon instructions may deprive a defendant of a fair trial." (*Ibid.*) However, there is no error where a modification is de minimis and it neither changes the thrust of the instruction nor prejudices the defense argument. (*Ibid.*)

Here, the trial court was well within its discretion when it determined not to reopen argument, as the new definition of "corruptly" did not change the thrust of the agreed upon instructions and did not undercut defendant's case and earlier argument. The instruction's effect was de minimis, providing a common sense, statutory definition to the term. There was no material difference between the ordinary meaning of "corruptly," as the parties had argued to the jury, and the statutory

definition given by the court. In one way or another, the parties argued the term referred to one who was attempting to gain an advantage for himself in an illegal or wrongful way. The new instruction simply supported the parties' arguments. In short, there was no way the jury would have reasonably believed defense counsel misled them in any fashion.

Moreover, the trial court had discretion to prevent repetitive argument. Because the parties had already explained to the jury that the term "corruptly" went to the issue of defendant's wrongful intent to gain an advantage, the court was under no obligation to allow the attorneys to make the same argument under the guise of the new instruction. Defendant suffered no constitutional or statutory denial of his right to closing argument by counsel.

II

Sufficiency of Evidence

Defendant claims insufficient evidence supports his conviction of attempting to influence a juror. Specifically, he asserts there was insufficient evidence that he intended to corruptly influence Juror L., the same element of the crime discussed above. We disagree.

Defendant said to Juror L., "Vote for me." Spoken by a defendant who is on trial to a juror who would decide his fate, the statement alone is sufficient evidence to support the verdict. Defendant did not testify, so there is no evidence of his actual intent. Even if Juror L. thought defendant was trying to be funny, that perception as evidence of defendant's

intent, even if believed by the jury, did not foreclose the jury from concluding that defendant simultaneously intended for Juror L. to acquit him. The jury concluded such was defendant's intent, and substantial evidence supports that determination.

III

Statutory Bases for Fines, Penalties, and Fees

Defendant argues, and the Attorney General agrees, that the trial court failed to specify the statutory bases for all of the fines, penalties, and fees it assessed against defendant as part of its order. Although the orders admitting defendant to probation and the court's minute orders specify authority for most of the assessments, they do not specify authority for all.

Penal Code section 1213 requires a court to furnish a commitment document or probation minute order that specifies the statutory bases for imposing all fines, penalties, and fees to the extent required for an abstract of judgment. (*People v. Eddards* (2008) 162 Cal.App.4th 712, 717-718.) We will remand the case to the trial court to correct this error. We specifically refer to the following conditions: Order Admitting Defendant to Probation (case No. 07-185) conditions 9 and 10; and Order Admitting Defendant to Probation (case No. 06-2010) conditions 9, 10, and 11.

DISPOSTION

This case is remanded to the trial court solely for purposes of specifying, in a manner bearing the form and content of an abstract of judgment, the statutory authority for each fine, penalty, and fee the court imposed on defendant, in

accordance with this opinion and Penal Code section 1213. In all other respects, the judgment is affirmed.

NICHOLSON, J.

I concur:

SCOTLAND, P. J.

I concur in the result. While I cannot say there was insufficient evidence to support defendant's conviction, from where I sit I cannot help believe that what appears to have been a stupid off-the-cuff remark tossed out by defendant on the spur of the moment in the men's room did not justify the expenditure of prosecutorial and judicial resources that have now been devoted to it.

ROBIE, J.